New Aboriginal heritage provisions

On 1 October 2010 new procedures will commence which will provide a transparent, consistent and effective approach to protecting and managing Aboriginal cultural heritage in New South Wales. These changes are due to recent amendments to the Aboriginal heritage provisions in the National Parks and Wildlife Act 1974 (NPW Act). There are also three Amending Regulations – the Threatened Species Amendment Regulation 2010, the National Parks and Wildlife Amendment Regulation 2010, and the National Parks and Wildlife Amendment (Aboriginal Objects and Places) Regulation 2010.

These new provisions are an initial reform while the NSW Government undertakes a more complete review of the laws that protect Aboriginal cultural heritage in NSW.

New offences

There are new offences relating to harm to, or desecration of, an Aboriginal object or declared Aboriginal Place. Harm includes to destroy, deface, damage or move.

The most significant change is the introduction of tiered offences and penalties. Offences committed with knowledge, in aggravating circumstances or in relation to an Aboriginal Place will attract higher penalties than previously. There is a new strict liability offence of harming Aboriginal objects and of harming or desecrating Aboriginal Places. The new penalties are summarised in fact sheet 3.

Exemptions

There are exemptions to the new Aboriginal heritage offences, including when the harm:

- was authorised by or under the State Emergency and Rescue Management Act 1989
- was authorised by or under the Rural Fires Act 1997 in relation to any emergency fire fighting act or bushfire hazard reduction
- was required or permitted under a conservation agreement entered into under the NPW Act
- was required for the conservation or protection of an Aboriginal object or Aboriginal Place and was carried out by a DECCW officer or a person under the direction of that officer
- occurred while an Aboriginal person was undertaking a traditional cultural activity (not a commercial activity).
Defences
The strict liability offence of harming Aboriginal objects has a number of defences, including the statutory defence of due diligence, which can include compliance with an adopted industry code of practice (see fact sheet 2). Compliance with the conditions of an Aboriginal Heritage Impact Permit (AHIP) is also a defence for all the new offences.

The need to follow a due diligence process is removed if you are carrying out an activity defined in the Regulation as a low impact activity. These include undertaking specified farming, land management, maintenance, surveying or environmental rehabilitation works.

Changes to Aboriginal Heritage Impact Permits
Previously, the NPW Act required two permits for the majority of activities – one for the initial survey work and the second for the activity itself. The new provisions collapse these requirements into a single regulatory provision.

A permit will no longer be required to look for Aboriginal objects providing the search is in accordance with the Draft Code of Practice for Archaeological Investigation NSW (www.environment.nsw.gov.au/licences/achregulation.htm). Archaeological test excavations that follow this code do not require an AHIP.

AHIPs can now be issued in relation to specified parcels of land and deal with multistage developments. There are clear provisions for the variation, transfer, suspension and revocation of AHIPs.

An improved structure for the processing and issuing of AHIPs has been established. There is an exhaustive list of factors that a DECCW decision-maker must consider when determining an AHIP application. An AHIP applicant can appeal a decision in the Land and Environment Court within 21 days of receiving notice of the decision. There are legal requirements for consultation requirements with Aboriginal people relating to AHIP applications (www.environment.nsw.gov.au/licences/consultation.htm).

Further information
Copies of the legislation can be found at www.legislation.nsw.gov.au. Further information on Aboriginal cultural heritage regulation can be found at www.environment.nsw.gov.au/licences/achregulation.htm, or contact DECCW’s Environment Line on 131555 or by email at info@environment.nsw.gov.au.